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IN THE

Supreme Court of the United States

KEMPER INSURANCE COMPANIES,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For over a century, federal courts have allowed common carriers to limit their liability by contract to a value declared by the shipper, *as long as the carrier's limitation of liability does not exempt the carrier from liability for its negligent acts.* Federal Express's limitation of liability for valuables (jewelry, artwork, etc.) limits the value a shipper can declare to a maximum of $500, although Federal Express accepts and solicits for carriage valuables worth substantially more than $500. Thus, by artful contracting, Federal Express exempts itself from liability by offering no terms by which a shipper of valuables can hold Federal Express liable for any amount approaching the actual value of the goods. The First Circuit nonetheless held in this case that Federal Express's limitation of liability for valuables is enforceable under federal common law whether Federal Express was acting as a motor carrier or an air carrier, a ruling that deprives the shipping public of the right to freely declare the value of the goods they entrust to common carriers and hold common carriers liable up to the value declared.

The question presented is:

Can a common carrier legally limit its liability where it contractually restricts the value a shipper can declare to a given amount but accepts shipments worth well in excess of that given amount, thereby exempting the common carrier from liability for its negligent acts for the difference between the amount allowed to be declared and the actual value of the goods?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Kemper Insurance Companies, states that it has no parent corporation and that no publicly held company owns 10% or more of Kemper Insurance Companies' stock.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Hon. Douglas P. Woodlock, U.S. District Judge) granting respondent's motion for partial summary judgment and denying petitioner's motion to amend the complaint is published at 115 F. Supp.2d 116. The court of appeals' opinion (per Torruella, C.J., joined by Bownes and Lipez, JJ.) affirming is published at 252 F.3d 509.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and judgment on June 12, 2001. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The text of 49 U.S.C. § 14706 is attached at 38a-44a.

STATEMENT OF THE CASE

At the outset, petitioner would like to stress the importance of the affect of the circuit court's ruling upon the shipping public. The circuit court held that a common carrier need not provide the shipper with any means by which the shipper can obtain insurance *from the carrier* for any appreciable percentage of the value of the item the shipper entrusts to the carrier. By limiting the value a shipper can

declare to a negligible amount in proportion to the value of the property shipped, the shipper is denied the option of insuring the property by declaring its value on the carrier's bill of lading. Under the circuit court's holding in this case, a shipper, be it a commercial shipper or a private citizen, would have no alternative but to approach a private insurer in order to have the item they entrust to a common carrier insured. Such an anomaly is inconsistent with federal common law concerning common carriage in interstate commerce for the following reasons:

First, a shipper would not be able to obtain insurance for the property shipped without going through the cumbersome and time consuming process of approaching private insurers, and waiting for underwriting to approve providing coverage. Even then, the private insurer could elect not to provide coverage. If shippers, especially private citizens, were required to obtain coverage from private insurers, transportation in this country would be unduly encumbered. This result is in stark contrast to the traditional requirements of federal common law whereby the shipper could obtain full coverage from the carrier by simply declaring the value of the property on the bill of lading and paying a higher freight charge.

Second, the carrier would have no sufficient incentive to safeguard the property entrusted to it by the shipping public. If the common carrier is able to exempt itself from liability for its negligence by severely limiting the amount of value a shipper can declare on the bill of lading, the carrier is allowed to provide no terms by which a shipper can hold the carrier liable for any amount approaching the value of the property accepted for carriage. As prior rulings of this Court have directed, a common carrier cannot exempt itself

from liability because doing so is inconsistent with the common carrier's duty under common law to safeguard the goods entrusted to it by the public.

A. Procedural History

Petitioner filed this action in Suffolk Superior Court in Suffolk County, Massachusetts on May 10, 1999, as a subrogor to recover the value of jewelry contained in eight packages which were lost or stolen while in the respondent's care, custody and control. The value of the jewelry in the eight packages was $140,500. On July 15, 1999, respondent, the defendant below, removed the case to the United States District Court for the District of Massachusetts.

In its initial complaint, petitioner alleged tort claims arising under state law and a claim of breach of the transportation contract which alleged respondent's limitation of liability was unenforceable because it limited the value shipper's could declare for valuables to $500. Respondent moved to dismiss petitioner's state law tort claims on the ground such claims were preempted by federal common law. Respondent moved for partial summary judgment as to the breach of contract claim seeking to enforce its limitation of liability.

Upon oral argument at the motion to dismiss and motion for partial summary judgment hearing held on February 16, 2000, the court took respondent's motion to dismiss and motion for partial summary judgment under advisement and granted petitioner's request that the parties file supplemental briefs to include issues regarding the applicability of 49 U.S.C. § 14706 (the "Carmack Amendment" attached as 38a-44a) and to further brief whether respondent's limitation

of liability for valuables, including jewelry, violated federal common law. In addition, the court allowed the petitioner to file a motion to amend the complaint to include two counts arising under federal common law: Rescission Due to Material Breach and Willful and Wanton Misconduct, as well as a count of violation of 49 U.S.C. § 14706, as four of the eight shipments moved from New York to Boston entirely by truck.

By its ruling issued on September 20, 2000, the district court granted respondent's motion to dismiss petitioner's state law tort claims on the ground that said claims were preempted by federal law, and granted respondent's motion for partial summary judgment as to the breach of contract claim on the ground that respondent's limitation of liability for valuables did not violate federal common law and was, therefore, enforceable. In addition, the district court denied petitioner's motion to amend the complaint on the ground that it would be futile to include counts of Rescission Due to Material Breach, Willful and Wanton Misconduct and Violation of 49 U.S.C. § 14706.

The petitioner filed a Notice of Appeal seeking review of the district court's holding granting respondent's motion for partial summary judgment as to the breach of contract claim and denying petitioner's motion to amend the complaint to include claims of Willful and Wanton Misconduct and Violation of 49 U.S.C. § 14706. The First Circuit affirmed the district court's decision.

The petitioner has filed a Petition for Writ of Certiorari based upon the issues and argument presented herein.

REASONS FOR GRANTING THE WRIT

I. The First Circuit's Decision Is Inconsistent With Prior Decisions Of This Court.

The principle issue presented by this petition is whether respondent's limitation of liability pertaining to valuables (referred to as "items of extraordinary value" in respondent's air waybill and Service Guide) partially exempts respondent from liability for its negligence and, therefore, is unenforceable under federal common law. The contractual language of the limitation pertaining to valuables is as follows:

> For other shipments, the highest declared value is $50,000 *unless your package contains items of "extraordinary value" in which case the highest declared value allowed is $500.* (Emphasis added.)
>
> Items of "extraordinary value" include shipments containing such items as artwork, jewelry, furs, precious metals, negotiable instruments, and other items listed in our Service Guide.

(See 47a attached.)

It is plain that the limitation as it pertains to valuables does not allow shippers the opportunity to declare a value greater than $500. Therefore, although respondent accepts for carriage valuables of any worth and even solicits large shippers of such items, respondent provides no means by which a shipper can hold respondent liable for its negligent

acts in an amount greater than $500. By this language, respondent exempts itself from liability in a manner inconsistent with federal common law.

This Court has not considered the validity of a common carrier's limitation of liability since its decision in *New York, N.H. & Hartford R. Co. v. Nothnagle*, 346 U.S. 128 (1953), and has never considered the validity of an air carrier's limitation of liability. In *Nothnagle* and a series of cases decided by this Court in the wake of the passage by Congress of the Carmack Amendment to the Hepburn Act in 1906 (currently codified as 49 U.S.C. § 14706), this Court set forth the requirements by which a carrier must abide in order to legally limit its liability under federal common law.

A carrier is liable for the actual value of the property in its care, custody and control unless it legally limits it liability by contract. *See Kansas City Southern Railway Company v. J.M. Carl*, 227 U.S. 639, 651 (1913), quoting *Hart v. Pennsylvania R. Co.*, 112 U.S. 331, 340-41 (1884). *See also First Pennsylvania Bank, N.A. v. Eastern Airlines Incorporated*, 731 F.2d 1113, 1116 (3d Cir. 1984) (applying to air carriers this basic tenet of federal common law governing limitations of liability.).[1] The principle that a

1. *See First Pennsylvania* at 1117 applying federal common law to air carriers:

> The same principle was carried over into federal common law when air carriers were subjected to regulation. The regulatory statutes did not contain language equivalent to the Carmack amendment. However, both the Civil Aeronautics Board and the Federal Aviation Act contained a savings provision

(Cont'd)

carrier can limit its liability is based on the idea that if the shipper and the carrier agree on a value less than the actual value in order for a lower freight charge to be applied, the shipper is estopped from later seeking more damages than the agreed upon, or "declared", value. See, for example, *Missouri Kansas & Texas Railway Company v. Harriman Brothers*, 227 U.S. 657, 668 (1913), wherein this Court wrote in upholding a carrier's limitation of liability:

> In any event, the rate sheets do provide for a choice between two rates, one with and one without a declared valuation. In one case the carrier is liable for whatever loss or damage the shipper sustains, and in the other its liability is limited to the valuation upon which the rate was based. The ground upon which the shipper is limited to the valuation declared is that of estoppel

Id. See also, Union Pacific R. Co. v. Burke, 255 U.S. 317, 321 (1921).

Petitioner is aware of no case where a carrier's limitation was enforced in which the shipper did not have the option of

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(Cont'd)

preserving "the remedies now existing at common law or by statute . . ." 49 U.S.C. § 1506 (1976) [now 49 U.S.C. § 40120(c) and attached as 41a]. In accordance with section 1506, the general policy of common carrier liability and duty to maintain reasonable and non-discriminatory rates were applied by the federal courts so as to recognize the doctrine developed under railroad regulation. That section 1506 "expressly incorporated the entire federal common law applicable to carriers" was declared in Klicker v. Northwest Airlines, Inc., 563 F.2d 1310, 1314 (9th Cir. 1977).

declaring a value of the property shipped up to the value the carrier accepted for carriage. Respondent's limitation, however, does not provide the shipper with the freedom of choosing to declare a value over $500, although respondent accepts valuables of any value. Therefore, shippers such as petitioner's subrogees cannot be estopped from recovering the actual value of their property on the ground that they did not declare the value of their property *because respondent has denied them the opportunity to do so.*

Repeatedly in cases concerning the enforceability of a carrier's limitation of liability, this court has stressed the basic common law tenet that for a limitation to be enforceable, the carrier cannot exempt itself from liability. Please see, *Nothnagle* at 136; *Burke*, at 321-22; *Boston & M.R.R. v. Piper*, 246 U.S. 439, 444 (1918); *George N. Pierce Company v. Wells Fargo & Company*, 236 U.S. 278, 283 (1915); *Boston & Maine Railroad v. Katherine Hooker*, 233 U.S. 97, 120-21 (1914); *Missouri Kansas & Texas Railway Company v. Harriman Brothers*, 227 U.S. 657, 672 (1913); *Kansas City Southern Railway Company v. J.M. Carl*, 227 U.S. 639, 649-50 (1913); *Adams Express Company v. E.H. Croninger*, 226 U.S. 491, 509 (1913); *Hart v. Pennsylvania R. Co.*, 112 U.S. 331, 338 (1884).

Each of the cases cited instructs in no uncertain terms that a carrier cannot stipulate away its liability for negligence. As reiterated by this Court in *Union Pacific R. Co. v. Burke*:

> This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence or that of its servants.

> (112 U.S. 331, 338, 5 Sup. Ct. 151, 28 L.Ed. 717, and 246 U.S. 439, 444, 38 Sup. Ct. 354, 62 L.Ed. 820, Ann. Cas. 1918E, 469, supra), and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choice of rates was given – where 'the rate was tied to the release.

Id. at 331. Later, in *Nothnagle* this Court restated its position by the following language:

> But only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained . . . (citations omitted). Binding respondent by a limitation which she had no reasonable opportunity to discover would effectively deprive her of the requisite choice; such an arrangement would amount to a forbidden attempt to exonerate a carrier from the consequences of its own negligent acts . . . (citations omitted). "The great object of the common law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the community. A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment." It is recognized that the carrier and the individual are not on equal footing.

Id. at 135-36, citing *Santa Fe P. & P.R. Co. v. Grant Bros. Construction Co.*, 228 U.S. 177, 184-85 (1913).

By accepting valuables of any value but limiting the amount a shipper can declare to $500, respondent exempts itself from liability for any amount over $500. Under respondent's limitation for valuables, a shipper has only the choice of declaring no value, in which case respondent is liable in the amount of $100 for its negligence, or declaring a value of $500 no matter the worth of the property shipped. If a shipper declares a value in excess of $500, respondent will accept the property for carriage but the most the shipper can recover for respondent's negligence is $500. The circuit court held this limitation enforceable under federal common law. However, this Court's prior rulings illustrate that the circuit court's holding was erroneous.

The case decided by this Court which is most directly on point is *Union Pacific R. Co. v. Burke*. In *Burke*, the carrier's limitation clause at issue read as follows:

> It is expressly agreed that the goods named in this bill of lading are hereby valued at not exceeding $100 per package, * * * and the liabilities of the companies therefor in case of the total loss of all or any of the said goods from any cause shall not exceed $100 per package.

(*Id.* at 319, as quoted in the opinion.) In *Burke*, the petitioner shipped 56 packages via the carrier. The carrier offered no terms by which shippers could hold it liable for any amount over $100, although the carrier accepted shipments worth well in excess of $100. The court struck down the limitation on the ground that the carrier was exempting itself from liability for the difference between $100 and the actual value of the goods shipped:

> Upon the facts thus stated the petitioner contends that the agreed valuation of $100 per package or case in the Yokohama bill of lading is necessarily imported into the uniform bill of lading, becomes the valuation "agreed upon" within the terms and conditions quoted in that bill, and limits the respondent's recovery to that amount, $5,600, regardless of the value of the property and of the fact that it was lost by the carrier's negligence.

Id. at 320.

"With this contention we cannot agree."

> This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common law liability by contracting for exemption from the consequences of its own negligence or that of its servants [citations omitted], and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choice of rates was given – where "the rate is tied to the release."

Id. at 321. Later in the opinion this Court explained its reasoning in finding the limitation unenforceable under federal common law:

> To allow the contention of petitioner would permit carriers to contract for *partial* exemption from the results of their own negligence without giving to shippers any compensating privilege.

(Emphasis added.)

Id. at 323. This Court struck down the limitation because it acted to partially exempt the carrier from the consequences of its negligence. Therefore, the Court held that although the carrier accepted some responsibility (up to $100) for its negligent acts, that was not enough to save the limitation.

Likewise, in *Kansas City Southern Railway Company v. J.M. Carl*, this Court stated succinctly that a carrier may not partially exempt itself from liability. In that case, the carrier sought to enforce a limitation where the released value was $5 per case unless the shipper declared a higher value. Importantly, and unlike respondent, the carrier did not limit the value a shipper could declare and, therefore, this Court upheld the limitation because it did not represent a partial exemption of the carrier's liability:

> Is the contract here involved one for exemption from liability for negligence, and therefore forbidden? An agreement to release a carrier *for part of a loss* due to negligence is no more valid than one whereby there is complete exemption.

Id. at 650.

In this case, as in *Burke*, the respondent places a cap on the value a shipper can declare, but accepts packages of any value. In *Burke*, the carrier exempted itself from liability over $100. Here, respondent exempts itself from liability for over $500 for valuables, which by their very nature are often worth much more than $500. Therefore, while respondent accepts and solicits valuables worth well in excess of $500, respondent partially exempts itself from liability because respondent's limitation offers no terms by which respondent can be held liable for any amount over $500.

A. Respondent Could Have Limited Its Liability By Choosing To Limit The Value Of Goods It Accepts.

Numerous circuit and district courts have upheld carriers' limitations of liability wherein carriers escape the possibility of large, unforeseen liability resulting from valuable items being placed in their care, custody and control without the carriers' knowledge, when the limitations expressly state the carrier does not accept commodities worth more than a certain amount. Carriers can legally limit their liability by placing an upper limit on the value of goods they accept for carriage. *First Pennsylvania Bank, N.A. v. Eastern Airlines*, 731 F.2d 1113, 1118 (3d Cir. 1984); *Universal Computer Sys., Inc. v. Allegheny Airlines, Inc.*, 479 F. Supp. 639 (M.D. Pa. 1979); *Klicker v. Northwest Airlines, Inc.*, 563 F.2d 1310 (9th Cir. 1977). So long as the carrier allows the shipper to declare a value up to the value a carrier agrees to accept, carriers do not violate the rule set forth by this Court that carriers cannot exempt themselves for liability for their negligence.

For example, in *First Pennsylvania*, an often cited case, the carrier's tariff stated that goods valued at over $500 were not acceptable for carriage. *Id.* at 1118. In *Universal Computer Sys.*, the carrier did not accept items worth more than $500. Likewise, in *Klicker*, the carrier's tariff stated it would not accept items with a value of over $5,000. *Id.* at 1314-16.

In each case, the court found the limitation to be enforceable, rulings which are not inconsistent with this Court's prior rulings because, in each case, the limitation permitted the shipper to declare a value up to the value the carrier agreed to accept. Therefore, the limitations did not

exempt the carriers from liability. The circuit court specifically recognized that in *First Pennsylvania*, *Universal Computer* and *Klicker*, the carriers' limitations expressly stated they do not accept shipments over a certain value. (6a-8a attached.)

The limitations in those cases are in stark contrast to respondent's limitation in that respondent's limitation does not state that respondent will not accept items over $500, but does state that shippers cannot declare a value greater than $500. In this way, respondent's limitation for valuables is like the limitation struck down by this court in *Burke*, wherein the carrier accepted packages of any value but did not offer terms by which the carrier could be held liable for an amount greater than $100.

The First Circuit disregarded this distinction, and the prior rulings of this Court, without addressing this Court's prior rulings which prohibit a carrier from exempting itself from the consequences of its negligence. (6a-8a attached) The circuit court failed to consider this independent prerequisite to the enforceability of a carrier's limitation. Instead, the circuit court based its decision on the idea that allowing a shipper of "items of extraordinary value" (as defined by respondent in its limitation) to choose between a released rate of $100 or a maximum declared value of $500 gave the shipper a fair opportunity to declare the value of its valuable item.

The circuit court's opinion begs the question, How low a value can a carrier limit a shipper to declare? If a carrier has a released rate of $100, such as respondent, and limits the value a shipper can declare to $500, could the carrier have also limited the value a shipper can declare to $101?

The circuit specifically declined to answer this question, finding that $500 was high enough without explanation. In footnote 4 of the opinion, the circuit court wrote:

> Kemper contends that this logic would approve of an option providing only an extra dollar of liability. We doubt that it carries that far; at any rate, we agree with the district court that in this case, $500 is opportunity enough.

(See 7a attached.) Petitioner notes that the circuit found that "$500 was enough" in a case concerning a limitation for goods described by respondent as *"items of extraordinary value."* Under this reasoning, what is enough for a limitation concerning general freight? $300? $200?.

The circuit court's ruling opens up the gates of uncertainty where this Court's prior rulings have kept it closed. This Court's rulings cited above have created a bright-line rule; i.e. carriers must allow shippers the option of declaring a value up to the value the carrier agrees to accept for carriage. The circuit court has impermissibly blurred the line, creating a situation harmful to the shipping public, as addressed below.

That respondent will accept valuable items worth more than $500 is undisputed. In fact, as recognized by the First Circuit in its opinion, respondent *solicits* shippers of valuable items. As stated in that opinion, "the record shows that FedEx actively solicited the carriage of jewelry clearly worth more than $500." (See p. 8a attached hereto.)

The reason respondent did not choose the traditional method utilized by common carriers of limiting the value of

items they will accept in order to guard against unexpectedly large liability is obvious. If respondent stated in its limitation that it would not accept valuable items worth more than $500, respondent would not be able to solicit and accept high value traffic in good faith. It would be acting in contradiction to its own contractual terms each time it solicited or knowingly accepted high value traffic and would not be able to reap the profits of moving such traffic.[2]

Respondent exempts itself from liability for its negligence by accepting shipments worth well in excess of $500, but limits the value a shipper can declare and, thus limits its liability, to $500. Therefore, the First Circuit's decision in this case is inconsistent with prior rulings of this Court and this writ should be granted.

II. Consequences Of The Circuit Court's Ruling On The Shipping Public.

Under the First Circuit's ruling in this case, a carrier can limit the value a shipper of *valuable items* can declare to $500, even though the carrier accepts and solicits shipments of valuables of far greater value. This ruling creates the potentiality of serious and unfavorable consequences for the shipping public; both commercial shippers and private citizens.

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2. In the event shippers of high value traffic do declare a value in excess of $500 despite the fact they are prohibited from doing so by respondent's limitation, respondent charges a higher rate, but denies liability in excess of $500 if something happens to the package. Therefore, respondent does not provide a rate commensurate with the risk assumed by respondent as required by the decisions of this Court cited above. Respondent charges a higher rate, but does not offer additional liability coverage.

First, under this ruling, a common carrier can effectively absolve itself from liability by providing no means for a shipper to obtain liability coverage for a shipment by declaring the value of the shipment on the carrier's air waybill or bill of lading. Commercial shippers, as well as private citizens, are left with no way to obtain liability coverage except through a private insurer. Federal common law has never required a shipper to approach a private insurer in order to obtain coverage. However, under this ruling, that is the shipper's only choice.

Federal common law has never allowed such a burden to be placed on the shipping public. Under this ruling, private citizens would have to attempt to get coverage by approaching private insurance companies. Unlike larger commercial shippers, private citizens would be unable to offer the same volume of shipments and would likely have to pay more for private insurance, if they were able to obtain coverage at all. Obtaining private insurance is also time-consuming. This is in stark contrast to the simplicity and efficiency of being allowed to declare the value of an item on a bill of lading or airbill and thereby obtain coverage.

Second, because, under this ruling, a common carrier need not provide the shipper with the opportunity to declare the value of goods shipped and thus hold the shipper liable therefor, the common carrier has no incentive to safeguard the goods entrusted to it by the shipping public. As reemphasized by this Court in *Nothnagle*, the last case where this Court considered the enforceability of a common carrier's limitation of liability:

> The great object of the law governing common carriers was to secure the utmost care in the

> rendering of a service of the highest importance to the community. A carrier who stipulates not to be bound to the exercise of care and diligence seeks to seeks to put off the essential duties of his employment.

Id. at 990.

If carriers are allowed to accept shipments but offer no means for the shipping public to hold them liable for their negligent acts beyond a negligible amount, carriers have no adequate incentive to safeguard the goods tendered them. Such has been the reasoning of this Court in requiring that carriers cannot exempt themselves from liability. *Id.*

Third, the circuit's opinion applies to common carriers in general and the opinion is applicable to all types of freight, not just valuables. Petitioner alleged that four of the eight shipments moved entirely by truck from New York to Boston and, therefore, the Carmack Amendment applied to those shipments. The circuit court, in rendering its decision, accepted petitioner's allegations as true, but ruled that the distinction made no difference. (10a)

Therefore, under this ruling, trucking companies, airlines and railroads carrying every type of freight could limit the value shippers could declare on bills of lading or airbills to a negligible amount in proportion to the value of the freight being moved. For example, for a truck load shipment worth $50,000, the trucking company could, under this ruling, accept the shipment but limit the value a shipper could declare to $500, thus exempting itself from liability for any amount over $500. If a $20,000 claim arose, the carrier could simply pay $500, as respondent currently does, and would have no

exposure over that amount. And, as pointed out above, there is nothing in the opinion which disallows the trucking company from limiting the declared value to $200 or $300.

Therefore, trucking companies could do as respondent does and deny claims of over $500 (or a lower amount) not because they are not liable under the Carmack Amendment (49 U.S.C. § 14706, 39a-44a), but simply because they had a provision which did not allow shippers to declare a value over that amount, such as respondent has. That the entire regulatory scheme concerning resolution of claims is undermined by the First Circuit's ruling is not an overstatement.

More importantly, a private citizen shipping an item worth $10,000, for example, would have no means of obtaining coverage for that item, except to approach a private insurance company. The carrier could accept the item, as respondent currently accepts such items, and if the item is lost or damaged while in the carrier's possession, the carrier could simply pay some negligible amount ($500 or lower under the circuit court's decision) to the individual and wash its hands of the claim.

As shown above, such a result, which is allowed by the circuit court's opinion, is contrary to over a century of federal law governing common carriers. Therefore, this court should grant this writ to fully consider the consequences the circuit court's ruling has on the shipping public.

CONCLUSION

The circuit court's decision in this case is inconsistent with prior rulings of this Court and thereby creates consequences harmful to the shipping public. Therefore, this writ should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JUNE 12, 2001

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 00-2300

KEMPER INSURANCE COMPANIES,

Plaintiff, Appellant,

v.

FEDERAL EXPRESS CORPORATION,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Douglas P. Woodlock, *U.S. District Judge*]

Before
TORRUELLA, *Chief Judge*,
BOWNES, *Senior Circuit Judge*,
and LIPEZ, *Circuit Judge*.

* * *

June 12, 2001

TORRUELLA, *Chief Judge*. This appeal involves eight packages of jewelry shipped by defendant-appellee

Federal Express ("FedEx"). The shipper, Holmes Protection Group, Inc. ("Holmes"), purchased third-party insurance from plaintiff-appellant Kemper Insurance Companies, Inc. ("Kemper"). Kemper, as subrogee, sought to invalidate the $100 limitation of liability provided for in the relevant shipping documents. The district court concluded that the limitation of liability was valid, and that attempts by Kemper to amend its complaint to include: (i) claims under the Carmack Amendment, 49 U.S.C. § 14706; and (ii) claims of willful and wanton misconduct, were futile. *Kemper Ins. Cos.* v. *Fed. Express Corp.*, 115 F. Supp. 2d 116 (D. Mass. 2000). For the reasons herein, we affirm.

BACKGROUND AND PROCEDURAL HISTORY

The relevant facts in this appeal are undisputed, with one exception, which we note below.

Holmes tendered eight packages containing jewelry to FedEx between June 26 and December 22, 1998. Seven of the packages never reached their destination; one arrived empty. Each of the packages was sent under FedEx Master Powership Agreements, which note that FedEx limits its liability in a manner described in its Service Guide. The Service Guide, in turn, explains that "liability with regard to any package is limited to the sum of $100 unless a higher value is declared on the airbill for the package at the time of tender, and a greater charge paid as provided . . . below." For most types of goods, FedEx allows shippers to declare a value up to $50,000. However, for "items of extraordinary value," including jewelry, the maximum declared value is

limited to $500. Moreover, the shipping agreement provides that "any effort to declare a value in excess of the maximums allowed in this service guide is null and void," and disclaims any liability "in excess of the declared value of a shipment." No value was declared for any of the shipments in question.

Kemper, acting in its capacity as subrogee to Holmes, brought claims against FedEx sounding in tort and contract. FedEx moved to dismiss the tort claims as preempted by the Airline Deregulation Act (ADA). Although the district court held that the savings clause of the ADA preserved federal common law remedies in tort for lost shipments, *id.* at 120-21, it concluded that the airbill limited FedEx's liability to $100 per shipment, that Kemper could not "avoid this limitation by recasting its claims as tort action," *id.* at 121, and therefore granted the motion to dismiss.

With respect to the claims sounding in contract, the district court determined that under applicable federal common law, specifically the "released value doctrine," the FedEx limitation of liability provision was valid because it allowed the shipper to increase FedEx's exposure to $500 by declaring a higher value and paying a correspondingly higher shipping fee. *Id.* at 122-24. Moreover, the district court noted that limitations of liability are viewed in a particularly generous light when the shipper chooses to take out private insurance, as did Holmes in this case. *Id.* at 124. The court therefore dismissed Kemper's claim seeking to void the limitation on liability as contrary to public policy, *id.*, and granted FedEx partial summary judgment on the breach of contract claim based on the $100 limitation of liability, *id.*

Kemper also sought to amend its complaint in two ways which, it contended, would provide legal support for invalidation of the limitation clause without reliance on the released value doctrine. First, Kemper claimed that because four of the eight packages traveled entirely by truck (instead of by air),[1] the Carmack Amendment's allegedly stricter standard made the limitation on liability invalid with respect to those four packages. The district court did not determine whether the Carmack Amendment applied, instead concluding that because the contours of the Carmack Amendment mirrored those of the released value doctrine, Kemper's desired amendment was futile. *Id.* at 126-27. Second, Kemper sought to amend its complaint to include claims of willful and wanton misconduct on the part of FedEx. Kemper alleged that FedEx had been aware of, and ignored, the repeated theft of valuable shipped goods by employees. Kemper argued that FedEx's knowledge of rampant employee theft and lack of meaningful effort to prevent future thefts from occurring constituted willful and wanton misconduct, and that the conversion exception to the released value doctrine should apply.[2] The district court held that even if the exception included a "level of willful and intentional conduct . . . so egregious as to rise to the level of conversion for [a carrier's] own use," Kemper had not alleged sufficient facts to reach such a level. Accordingly, the court

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1. FedEx does not concede that the four packages in question traveled only by truck. As we explain, this factual dispute is ultimately irrelevant to the disposition of this appeal.

2. A carrier that has converted goods to its own use cannot enforce an otherwise valid limitation on liability. *See, e.g., Deiro* v. *Am. Airlines, Inc.*, 816 F.2d 1360, 1366 (9th Cir. 1987).

refused to allow the amendment to the complaint because it would have been futile to do so. *Id.* at 125-26.

DISCUSSION

Our review of a grant of summary judgment is de novo, with all material facts viewed in the light most favorable to the opposing party. *Campbell* v. *Washington County Technical Coll.*, 219 F.3d 3, 5 (1st Cir. 2000). We review the denial of a motion to amend a complaint for abuse of discretion. *Glassman* v. *Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996).

I. Federal Common Law and the Released Value Doctrine

When a shipper (or, as here, a subrogee standing in place of a shipper) contests the validity of a contractual clause that limits an air carrier's liability,[3] we apply federal common law. *See Hill Constr. Corp.* v. *Am. Airlines, Inc.*, 996 F.2d 1315, 1317 (1st Cir. 1993) (citing cases applying federal law); *Diero* v. *Am. Airlines, Inc.*, 816 F.2d 1360, 1365-66 (9th Cir. 1987); *First Pa. Bank, N.A.* v. *E. Airlines, Inc.*, 731 F.2d 1113, 1115-16 (3d Cir. 1984). Although traditional common law forbade a carrier from disclaiming liability for its own negligence, *First Pa. Bank*, 731 F.2d at 1116, the released value doctrine allows an air carrier to "limit [its] liability

3. Both sides agree that FedEx qualifies as an "air carrier" under federal law. *See* 49 U.S.C. § 40102(a)(2). However, Kemper alleges that four of the packages traveled solely by ground transportation, and that FedEx should not be treated as an air carrier with respect to those packages. *See infra* Part II.

for injury, loss, or destruction of baggage on a 'released valuation' basis." *Diero*, 816 F.2d at 1365 (citing *Klicker* v. *Northwest Airlines*, 563 F.2d 1310, 1315 (9th Cir. 1977)). In exchange for a lower shipping rate, the shipper is deemed to have released the carrier from liability beyond a stated amount. *Id.* However, the shipper is bound by this agreement only if (i) he has reasonable notice of the rate structure and (ii) he is given a fair opportunity to pay a higher rate in order to obtain greater protection. *Id.*; *see also New York, N.H. & Hartford Rail Co.* v. *Nothnagle*, 346 U.S. 128, 134-36 (establishing doctrine for common carriers); *Hill*, 996 F.2d at 1317; *First Pa. Bank*, 731 F.2d at 1117.

Kemper concedes that the shipper, its insured, had reasonable notice of the limitation of liability. However, it contends that the FedEx rate structure is not one that gives the shipper "a fair opportunity to pay a higher rate in order to obtain greater protection." *Diero*, 816 F.2d at 1365. Kemper argues that the contractually allowed increase to $500 of coverage is an insufficient difference to provide a "fair opportunity," especially when the $500 limit applies only to goods of "extraordinary value" such as jewelry, which are by definition worth significantly more than that limit.

This Court has noted that "[w]here air carriage . . . offer[s] the shipper a choice of paying a higher rate for greater protection, federal courts have normally found those limitations lawful." *Hill*, 996 F.2d at 1317 (citing numerous cases). Although we have not had the opportunity to determine when an alternative liability limit is sufficiently high so as to provide a "fair opportunity" to the shipper, other courts have upheld contractual limitations of a similar

magnitude to the one at issue here. *First Pa. Bank*, 731 F.2d at 1118 (choice between $50 and $500); *see also United States Gold Corp.* v. *Fed. Express Corp.*, 719 F. Supp. 1217, 1219 & 1225-26 (S.D.N.Y. 1989) (choice between $100 and $500); *Universal Computer Sys., Inc.* v. *Allegheny Airlines, Inc.*, 479 F. Supp. 639 (M.D. Pa. 1979) (choice between $50 and $500); *Klicker*, 563 F.2d at 1314-16 (choice between $500 and $5000). Notably, Kemper has not cited, nor have we discovered, any case in which a court invalidated a contract providing two discrete levels of coverage.[4] We are loath to police this line when other courts have chosen not to do so.

Kemper seeks to distinguish the above precedent by pointing out, correctly, that the relevant contractual provisions in these cases provided that the carrier would not accept goods with a declared value above the higher limitation. *See First Pa. Bank*, 731 F.2d at 1118 ("Shipments with a declared value in excess of $500.00 are not acceptable for transportation under this tariff."); *Klicker*, 563 F.2d at 1316 ("No participating carrier will accept [property], the declared value of which exceeds . . . $5,000."); *Universal Computer*, 479 F. Supp. at 641 ("Shipments with a declared value in excess of $500.00 are not acceptable for transportation under this tariff."). By contrast, not only did the FedEx contract in question not contain such a provision, but the record shows that FedEx actively solicited the carriage of jewelry clearly worth more than $500.

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4. Kemper contends that this logic would approve of an option providing only an extra dollar of liability. We doubt that it carries that far; at any rate, we agree with the district court that in this case, $500 is opportunity enough.

We are not convinced that this distinction makes a difference. First, the cases upholding limitations on liability did not rest their holdings on the fact that the carriers could refuse goods valued at more than the maximum amount. Second, the fact that FedEx did not retain the ability to reject packages with a declared value of more than $500 does not mean that the $500 limit did not provide shippers with a fair opportunity to increase their coverage by paying a higher rate; it only meant that they could not necessarily insure their packages at full value through the carrier. Kemper has conceded that the released value doctrine does not require carriers to offer a full value rate.

Moreover, the fact that third-party insurance was available, and was purchased by the shipper, counsels against invalidating the limitation on liability. "[A shipper] cannot contend that it was not given a 'fair opportunity' to opt for higher coverage [when that shipper] *did* opt for higher coverage when it insured [its package] through an independent entity." *Vision Air Flight Serv., Inc.* v. *M/V Nat'l Pride*, 155 F.3d 1165, 1169 (9th Cir. 1998); *see also Travelers Indem. Co.* v. *Vessel Sam Houston*, 26 F.3d 895, 900 (9th Cir. 1994) (deliberate choice to opt-out of higher coverage indicates existence of a fair opportunity). This is especially true when the plaintiff is not the shipper itself, but the subrogated third-party insurer of the package. In such a case, "it is always in the best interest of a shipper's insurance company to argue that the shipper was denied a fair opportunity to opt for higher liability. . . . 'As best we can tell, [the insurer] is now bringing this lawsuit in an attempt to shift . . . the burden of loss it was paid to insure.' " *Travelers Indem.*, 26 F.3d at 900 (citing *Carman Tool &*

Abrasives, Inc. v. *Evergreen Lines*, 871 F.2d 897, 901 n.10 (9th Cir. 1989)). "The [third-party] insurer merely stands in the shoes of the shipper, however, and cannot argue as if the shipper did not make the decision to insure separately." *Read-Rite Corp.* v. *Burlington Air Express, Ltd.*, 186 F.3d 1190, 1199 n.4 (9th Cir. 1999).

Lastly, we must point out that Kemper is in no way harmed by this type of limitation clause; in fact, it is the very existence of such a limitation that allows Kemper to market third-party package insurance. If FedEx altered its contracts to offer the type of first-party insurance suggested by Kemper, a shipper would either choose to insure through FedEx and not purchase supplementary insurance from Kemper, or would choose the lower released value and purchase the same coverage from Kemper, which in that case admits it would have no cause of action under the released value doctrine. *See Travelers Indem.*, 26 F.3d at 900 ("Why would [the shipper] increase its costs by insuring the same cargo twice?"); *cf. Glickfeld* v. *Howard Van Lines*, 213 F.2d 723, 726-27 (lack of prejudice stemming from deviation in bill of lading prevented recovery). Even if the released value doctrine technically provides Kemper a cause of action as subrogee, we are not overly sympathetic to the insurer's plight on these facts.

II. Claims Under the Carmack Amendment

Kemper alleges that four of the packages traveled entirely by ground transportation, and that, as a result, the Carmack Amendment, 49 U.S.C. § 14706, applies instead of federal common law. Like the district court, we do not

need to determine the applicability of the Carmack Amendment to packages shipped solely using the ground transportation services of an air carrier.[5] Instead, we agree that, with respect to the fair opportunity to declare a higher rate, the constraints on limitation clauses are the same for motor carriers covered by the Carmack Amendment as they are for air carriers covered by the released value doctrine.

Section 14706(c)(1) allows a carrier "to establish rates for the transportation of property . . . under which the liability of the carrier for such property is limited to a value established . . . by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation." In *Camar Corp.* v. *Preston Trucking Co.*, 221 F.3d 271, 276 (1st Cir. 2000), we indicated that this reasonableness requirement is

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5. We note, however, that there is significant precedent indicating that the Carmack Amendment simply does not apply to an air carrier such as FedEx. *See, e.g., Arkwright-Boston Mfrs. Mut. Ins. Co.* v. *Great W. Airlines*, 767 F.2d 425, 428 (8th Cir. 1985); *Williams* v. *Fed. Express Corp.*, No. CV 99-06252 MMM BQRX, 1999 WL 1276558, at *3 (C.D. Cal. Oct. 6, 1999); *Assoc. X-Ray Corp.* v. *Fed. Express Corp.*, Civ. No. 3:93CV02209(AVC), 1994 WL 897156, at *3 (D. Conn. July 22, 1994). None of these cases holding the Carmack Amendment inapplicable to air carriers addresses the specific facts alleged by Kemper, namely that certain packages traveled wholly by ground transportation. However, in *Federal Express Corp.* v. *California Public Utilities Commission*, 936 F.2d 1075, 1078 (9th Cir. 1991), the Ninth Circuit held that state law was preempted by the Airline Deregulation Act vis-à-vis packages shipped from Los Angeles to Oakland, California entirely by truck, suggesting that the Carmack Amendment does not apply to such packages.

met when the agreement affords the shipper "a reasonable opportunity to choose between the regular rate and a rate reflecting a higher level of liability." As we described earlier, this is virtually the same language that we and other courts have used in applying the released value doctrine. *See Hill*, 996 F.2d at 1317; *Diero*, 816 F.2d at 1365; *First Pa. Bank*, 731 F.2d at 1116. Moreover, our cases have suggested that the two inquiries apply essentially the same standard. *See Hill*, 996 F.2d at 1317 (citing both "post-deregulation air carrier cases" and "regulated carrier cases" to support one proposition); *Hollingsworth & Vose Co.* v. *A-P-A Transp. Corp.*, 158 F.3d 617, 620 (1st Cir. 1998) (noting the possibility that the air carrier case, *Hill*, had overruled a Carmack Amendment case, *Anton* v. *Greyhound Van Lines*, 591 F.2d 103 (1st Cir. 1978), but choosing to overrule *Anton* explicitly). Kemper has suggested no particular reason why the Carmack Amendment would mandate a different result than the released value doctrine in this case, and our review of the case law has not indicated that such a difference exists. We therefore agree that amendment of the complaint was futile, and was appropriately denied by the district court. *See Carlo* v. *Reed Rolled Thread Die Co.*, 49 F.3d 790, 792 (1st Cir. 1995).

III. Willful and Wanton Misconduct

Alternatively, Kemper argues that it should be allowed to amend its complaint to include claims of willful and wanton misconduct, and that such misconduct should qualify for the conversion exception to the released value doctrine. However, we agree with the district court that the conversion exception is far more narrow than would be necessary to include the conduct alleged by Kemper.

Appendix A

In *Glickfeld* v. *Howard Van Lines*, 213 F.2d 723, 727 (9th Cir. 1954), the Ninth Circuit outlined the scope of the conversion exception in the context of employee theft:

> [I]f the property has been converted by the carrier, it would be against public policy to permit the carrier to limit its liability and thus to profit from its own misconduct. However, the cases are uniform in holding that the conversion doctrine is pertinent only when there has been a true conversion, i.e., where the carrier has appropriated the property for its own use or gain. The carrier may properly limit its liability where the conversion is by third parties or even by its own employees. In the latter circumstance, while the carrier may have been guilty of negligence in the selection of its employees, it has not been unjustly enriched, nor has it been guilty of any misconduct.

Glickfeld strongly suggests that the conversion exception only applies when a carrier has converted the property "for its own use or gain." Most other courts to address the subject have interpreted *Glickfeld* in this manner. *Am. Cyanamid Co.* v. *New Penn Motor Express, Inc.*, 979 F.2d 310, 315-16 (3d Cir. 1992) ("[N]othing short of intentional destruction or conduct in the nature of theft will void the limitation on liability."); *Diero*, 816 F.2d at 1366 ("[O]nly an appropriation of property by the carrier for its own use will vitiate limits on liability."); *Rocky Ford Moving Vans* v. *United States*, 501 F.2d 1369, 1372-73 (8th Cir. 1974) (willful misconduct insufficient to invalidate value declaration in absence of fraud); *Aircraft Instrument & Radio, Co.* v. *United Parcel*

Serv., Inc., 117 F. Supp. 2d 1032, 1036 (D. Kan. 2000); *Cash Am. Pawn, L.P.* v. *Fed. Express Corp.*, 109 F. Supp. 2d 513, 525 (N.D. Tex. 2000). Because Kemper has made no allegation that FedEx appropriated the property *itself*, or profited from its conversion, the claim does not fit within the doctrine as outlined in these cases.

Kemper points to our opinion in *Hill* to suggest that, in this Circuit at least, the conversion exception might have a slightly greater scope. In *Hill*, we noted that "we have found a case that suggests, in dicta, that the willful nature of misconduct might make a difference." 996 F.2d at 1320 (citing *Glickfeld*, 213 F.2d at 727); *see also Lerakoli, Inc.* v. *Pan Am. World Airways, Inc.*, 783 F.2d 33, 37 (2d Cir. 1986) (suggesting that proof of "willful or intentional conduct" on the part of the carrier is sufficient).

However, both our decision in *Hill* and our review of other cases indicate that the conversion exception requires at least a stronger allegation of affirmative misdeeds than the willful blindness alleged by Kemper. In *Hill* itself, we chose not to decide the issue because no showing of willfulness had been made. 996 F.2d at 1320. We also clearly held that even egregious instances of negligence did not qualify for the exception. *Id.* ("[C]ourts will not impute to commercial parties (agreeing to a liability limitation) an intent to litigate the degree to which loss-causing negligence was ordinary, gross, or egregious."). From these comments, and from the almost universal position of other federal courts to have addressed this issue, we conclude that — whether or not the conversion exception to the released value doctrine includes certain willful conduct not technically a conversion

and not benefitting the carrier — willful blindness to the activity of third parties (even employees) does not qualify. Therefore it would have been futile for Kemper to have amended its complaint in this manner, and the district court appropriately refused its request to do so. *See Carlo*, 49 F.3d at 792.

CONCLUSION

We find that the contractual limitation of liability is valid under the released value doctrine, and that Kemper's proposed amendments to its complaint would indeed have been futile. The opinion of the district court is **affirmed**.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED SEPTEMBER 20, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 99-11523-DPW

KEMPER INSURANCE COMPANIES, INC.,

Plaintiff,

v.

FEDERAL EXPRESS CORPORATION
&
DOES (unidentified employees
of Federal Express Corporation),

Defendants.

MEMORANDUM AND ORDER
September 20, 2000

An insurance company brings this action against an air carrier in connection with the theft of eight shipments of jewelry. The air carrier moved for dismissal and partial summary judgment enforcing its limitation of liability provision. At the hearing on that motion, I invited further briefing and plaintiff thereafter moved to amend its complaint to allege liability for four shipments as a motor carrier.

Appendix B

I will allow the motion for dismissal and for partial summary judgement and deny the motion to amend as futile.

I. RELEVANT FACTS

A. The Parties

Plaintiff Kemper Insurance Companies, Inc. ("Kemper") is a corporation with a principal place of business in Summit, New Jersey.

Defendant Federal Express Corporation ("FedEx") is a corporation with its principal place of business in Memphis, Tennessee. Defendants Does are unidentified FedEx employees who are alleged to have stolen the shipments forming the basis of this dispute.

B. The Shipments

This dispute involves eight packages of jewelry that were shipped via FedEx by various shippers, subrogees of Kemper. The shippers used FedEx's Powership System which permits self-invoicing and generation of shipping labels by FedEx's customers. In its amended complaint Kemper asserts that four of the packages did not move by air but rather were transported by motor carrier.

A shipper can enter the following information into the Powership System: recipient's name and address, the FedEx service desired, the number and weight of the package, and a declared value. It is undisputed that none of the shippers declared a value for any of the shipments and that the

shipments were never delivered. FedEx is prepared to pay $100.00 per shipment, the maximum liability under FedEx's contract of carriage.

C. The Contract of Carriage

FedEx's contract of carriage consists of the Master Powership Agreement ("Agreement") and Service Conditions contained in the applicable FedEx Service Guide ("Service Guide"), incorporated by reference into the Agreement. The Powership Agreement reads in part:

> **Section 10. Terms and Conditions of Carriage.**
>
> Customer agrees that carriage by FedEx of any shipments tendered pursuant to this Agreement shall be in accordance with terms, conditions and limitations of liability contained in the Service Guide. Customer agrees to comply in all respects with terms and conditions of the Service Guide, which is incorporated into this Agreement by reference. . . . Our liability for loss, damage, delay, mis-delivery or non-delivery of your shipment or for misinformation or failure to provide information is limited. You may declare a higher value. Consult the Service Guide for details.

(Master Powership Agreement, ¶ 10, Ex. 1, C.)

Appendix B

The applicable sections of the Service Guide provide:

Declared Value and Limits of Liability

A. The declared value of any shipment represents our maximum liability in connection with a shipment, including, but not limited to any loss, damage, delay, misdelivery, nondelivery, misinformation or any failure to provide information.

Exposure to and risk of any loss in excess of the declared value is either assumed by the shipper or transferred by the shipper to an insurance carrier through the purchase of an insurance policy. You should contact an insurance agent or broker if insurance coverage is desired. WE DO NOT PROVIDE INSURANCE COVERAGE OF ANY KIND.

B. Our liability with regard to any package is limited to the sum of $100 unless a higher value is declared on the airbill for the package at the time of tender, and a greater charge paid as provided . . . below.

. . .

D. Except as limited below . . . , the maximum declared value per package . . . is $50,000. . . . If no value is declared, the declared value and

our liability will be limited to the actual value or $100, whichever is less.

. . .

F. Packages containing following items of extraordinary value are limited to a maximum declared value of $500:

. . .

4. Jewelry, including, but not limited to, watches . . . , precious and semiprecious gems or stones . . .

. . .

ANY EFFORT TO DECLARE A VALUE IN EXCESS OF THE MAXIMUMS ALLOWED IN THIS SERVICE GUIDE IS NULL AND VOID . . .

(Def.'s Exs., Ex. 1, B at 88-89.)

The Service Guide further provides:

WE WILL NOT BE LIABLE FOR ANY DAMAGES, WHETHER DIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL, IN EXCESS OF THE DECLARED VALUE OF A SHIPMENT, WHETHER OR NOT WE KNEW OR SHOULD HAVE KNOWN THAT SUCH

Appendix B

DAMAGES MIGHT BE INCURRED, INCLUDING, BUT NOT LIMITED TO, LOSS OF INCOME OR PROFITS.

D. Procedural History

Kemper filed this suit in Suffolk Superior Court on May 10, 1999. FedEx removed the case to this court on July 15, 1999, on the basis of diversity and federal question jurisdiction. In its initial complaint, Kemper sought to impose liability against FedEx under several legal theories, including: conversion as to the Does and FedEx (Counts I and II); breach of contract (Count III); voidability of FedEx's limitation of liability (Count IV); vicarious liability for Does' intentional torts (Count V); negligent hiring of employees (Count VI); negligent retention of employees (Count VII); and negligent control and supervision of employees (Count VIII).

Before me is FedEx's motion to dismiss Counts I, II, IV, V, VI, VII, and VIII of Kemper's Complaint and its motion for partial summary judgment as to Count III.

Kemper has since moved to amend its complaint seeking to modify its claims.[1] Kemper asserts that FedEx's limitation of liability is invalid because FedEx materially breached the contract (Count II), that FedEx was willful and wanton in its failure to prevent theft by its employees (count III), and that for four shipments FedEx's limitation of liability is invalid under the Carmack Amendment, 49 U.S.C. § 14706(c) (count IV).

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1. *See* note 3 *infra*.

Appendix B

This case turns upon the enforceability of the limitation of liability provision. The parties dispute the applicable principles under the Airline Deregulation Act ("ADA") and the motion to amend the complaint raises the potential application of the Carmack Amendment.

II. THE INITIAL COMPLAINT

A. Tort Claims (Counts I, II, V, VI, VII, VIII)

FedEx argues that Kemper's tort claims are preempted by the ADA. In the alternative, FedEx argues that under federal common law its liability is limited, and that Kemper may not avoid this liability limitation by recasting its claims as tort actions. Kemper replies that its tort claims are not preempted by the ADA because theft of cargo by FedEx's employees is not related to any service offered by an air carrier. Kemper further argues that the term "loss" in the airbill does not incorporate theft of cargo, making the limitation of liability provision of the contract not applicable to its tort claims.

The Fifth Circuit in *Sam L. Majors v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997), noted that in enacting the ADA, Congress added a savings clause providing that "[n]othing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies." *Id.* at 928, citing 49 U.S.C. § 1506[2]. Because prior to deregulation, federal common law governed lost shipment claims, the

2. This provision is now found at 49 U.S.C. § 40120(c).

savings clause acted to preserve the application of the federal common law. *Majors*, 117 F.3d at 928; *but see Greer v. Federal Express*, 66 F. Supp.2d 870, 873 (D.Ky. 1999). I concur with the reasoning of the *Majors* court that the savings clause of the ADA preserved the applicability of federal common law regarding suits against common carriers for lost shipments. *See First Pennsylvania Bank v. Eastern Airlines*, 731 F.2d 1113 (3d Cir. 1984) (holding that federal common law doctrine governed suit against common carrier that lost cargo). Thus, where a claim is for lost or damaged shipments, federal law controls.

I view the circumstances of this case, the allegations of thefts notwithstanding, to fall into the category of lost shipments. In the event of such loss, the contract limited FedEx's liability. Specifically, the Powership Agreement stated, "[o]ur liability for loss, damage, delay, mis-delivery or non-delivery of your shipment or for misinformation or failure to provide information is limited." I turn to federal law to examine Kemper's claim that the term "loss" does not incorporate theft, rendering the limitation of liability inapplicable to its tort claims.

Under federal law, a liability limitation provision may reach even willful misconduct as long as the defendant did not convert the misappropriated property to its own use or gain. *Deiro v. American Airlines, Inc.*, 816 F.2d 1360, 1366 (9th Cir. 1987) (holding that under federal common law, "only an appropriation of property by the carrier for its own use will vitiate limits on liability"). Consequently, if a liability limitation is valid, recovery for loss cannot exceed the limitation regardless of the degree of the carrier's

negligence, absent a showing of appropriation for its own use. Kemper has not demonstrated appropriation by FedEx to invalidate the liability limitation. Thus, Kemper is limited to the $100 liability limitation per shipment contained in the airbill. Kemper cannot avoid this limitation by recasting its claims as tort actions. For these reasons, I will grant FedEx's motion for dismissal of the tort counts.

B. Breach of Contract Claims (Counts III & IV)

1. Federal Law Applies

The question whether the contract between the parties should be enforced with the limitation of liability provisions (Count III) or whether the limitation of liability is void as against public policy (Count IV) turns upon federal law. The Supreme Court in *American Airlines v. Wolens*, 513 U.S. 219 (1995), outlined the limits on state law when the contract of an air carrier is at issue. In *American Airlines v. Wolens*, the Supreme Court held that the ADA's preemption clause, § 1305(a)(1), read together with the FAA's saving clause, § 1106 (preserving "the remedies now existing at common law or by statute"),

> stops States from imposing their own substantive standards with respect to rates, routes or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement

> or enhancement based on state laws or policies external to the agreement.

Wolens, 513 U.S. at 232.

A court deciding when air carriers may contractually limit their liability for loss of or damage to shipped cargo does not, of course, face a routine contract claim like the one presented to the Court in *Wolens*. In *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1197 (9th Cir. 1999), the Ninth Circuit observed:

> Deciding whether a limited liability provision is enforceable is a matter of 'substantive standards' and 'policies external to the agreement.' . . . Because the imposition of state standards to decide whether contractual limits on liability are enforceable is contrary to the language, intent, and purpose of the federal policy embodied in the ADA, we apply the federal common law to this question.

Read-Rite, 186 F.3d at 1197; *see also Reece v. Delta Air Lines*, 731 F. Supp. 1131 (D.Me. 1990) (applying federal common law to air waybill limiting carrier's liability).

2. FedEx's Limitation of Liability is Valid (Count III)

Under the federal common law, carriers may limit their liability to the value of the shipment if (1) the shipper has reasonable notice of the rate structure and (2) is given the option to pay a higher price for greater protection. *See Hill*

Constr. v. American Airlines, Inc., 966 F.2d 1315, 1317 (1st Cir. 1993). The federal common law requirement that the carrier give the shipper an option of greater protection in order to limit its liability validly is called the "released value doctrine." *See Deiro v. American Airlines, Inc.*, 816 F.2d 1360, 1365 (9th Cir. 1987); *Neal v. Republic Airlines, Inc.*, 605 F. Supp. 1145, 1148 (N.D.Ill. 1985). "When the facts of a case satisfy the released value doctrine, courts look to the contract language to determine the rights of the parties." *Reece*, 731 F. Supp. at 1134, citing *Neal*, 605 F. Supp. at 1148; *see also Read-Rite*, 186 F.3d at 1197 (stating "[o]nce it is determined that a limited liability clause is enforceable under federal common law, then the precise content of the contractual clause is a matter of 'the parties' bargain' to which state contract law applies").

Limited liability provisions are prima facie valid if the face of the contract recites the liability limitation and the "means to avoid it." *Read-Rite*, 186 F.3d at 1198, citing *Royal Ins. Co. v. Sea-Land Service Inc.*, 50 F.3d 723, 727 (9th Cir. 1995). The burden then shifts to the shipper to prove that it did not have a "fair opportunity" to purchase greater liability coverage. *Read-Rite*, 186 F.3d at 1198.

The contract of carriage between FedEx and the shippers consists of the Powership Agreement and the provisions of the Service Guide incorporated by reference into the Agreement. The limits on liability are clearly recited in the contract; indeed Kemper makes no notice argument. Kemper argues, instead, that because FedEx limits its liability for jewelry to $500, a shipper has no opportunity, much less a fair opportunity, to purchase higher liability. Because the

Service Guide, as quoted above, clearly states that any effort to declare a value in excess of the maximum allowed is null and void, FedEx offers no terms under which a shipper could hold FedEx liable for the full value of jewelry valued over $500. Plaintiff argues that this choice of limitations of liability, either $100 or a declared value up to $500, is insufficient under the released value doctrine because it provides no opportunity to "insure" for the full value of the jewelry through FedEx.

Kemper, however, has misconstrued the released value doctrine. It does not require the carrier to accept liability for the full value of all goods it transports. Rather, it requires that the carrier provide a "bona fide alternative" that gives greater protection than the lower limitation. *First Pennsylvania*, 731 F.2d at 1117. In the leading First Circuit case, *Hill Construction*, the court held that "[w]here air carriage contracts set forth limitations on carrier cargo liability in a 'reasonably communicative' form and offer the shipper a choice of paying a higher rate for greater protection, federal courts have normally found those limitations lawful." *Hill Construction*, 996 F.2d, at 1317.

It is true that in some formulations of the doctrine, courts have made reference to the requirement that carriers provide an option of declaring "full" value, and of receiving "unlimited" liability. *See, e.g.*, *Quasar Co. v. Atchison*, 632 F. Supp. 1106, 1114 (N.D.Ill. 1986) ("At a minimum, a full value rate for a deregulated service must actually be available so the shipper can make a choice. Otherwise the liability limitation is unenforceable."); *Hollingsworth & Vose Co. v. A-P-A Transportation Corp.*, 158 F.3d 617 (1st Cir. 1998)

(to validly enforce a liability limitation, a shipper must "also make[ ] an unlimited liability rate available to the shipper . . . ."). However, an arguable obligation to provide the option of declaring the "full" value of goods and paying a higher rate to have "unlimited" liability has never been held to bar a company from capping the highest valuation for which it would accept liability. That is, no court has ever held that a company cannot limit its liability, even as to the "declared value," if it clearly states that it will not accept a valuation above a certain limit, either for some or all goods. The courts that have used the language of "full" value, and "unlimited" liability appear on close examination to have used that language interchangeably with the language of "higher" value and greater amounts of liability, and do not appear to have intended to imply that the carrier cannot limit the amount a shipper may declare under the declared value option. To the degree that these courts intended the terms "unlimited" and "full" to prohibit a carrier from placing any ceiling on the value of goods for which it must accept liability, they have overstated the doctrine and I decline to follow them.

In fact there are numerous cases in which courts have enforced tariffs or contracts that limited the value that a shipper could declare, for some or all goods, and therefore effectively limited their liability, even for the higher level of protection. Kemper argues that in each case in which a court has held valid a cap on the valuation of the declared value option, the carrier has refused to accept the goods valued higher than the cap. *See First Pennsylvania Bank v. Eastern Airlines Inc.*, 731 F.2d 1113, 1118 (3d Cir. 1984); *Klicker v. Northwest Airlines, Inc.*, 563 F.2d 1310, 1316 (9th Cir. 1977); *Universal Computer Systems, Inc. v. Allegheny*

Airlines, Inc., 479 F.Supp. 639, 641 (M.D. Penn. 1979). While in each of these cases, the carrier purported to refuse to accept goods that had a value greater than its cap, closer examination demonstrates these cases support the proposition that actual refusal is not a requirement for a valid declared value cap.

In *Klicker*, for example, the carrier's liability was limited to $500, unless the shipper declared a higher value (and paid the corresponding higher rate), but in no case could the declared value exceed $5,000. The tariff at issue stipulated that " 'No participating carrier will accept for transportation or for storage personal property, including baggage, the declared value of which exceeds . . . (for Northwest) . . . $5,000.' " *Klicker*, 563 F.2d, at 1316. However, immediately after reciting the tariff language, the court observed that "[the language quoted above] functions merely as a ceiling on valuations declared pursuant to Rule 370A [the rule that allows a shipper to declare a value higher than $500]." In other words, the court interpreted the right to refuse to accept goods as simply a means to signify a cap on the declared value at some amount meaningfully higher than the ordinary limitation of liability, but not at the full value, no matter how high. It did not require that the carrier actually refuse to transport goods of higher value.

In *Universal Computer Systems*, the applicable tariff stated that the ordinary limitation of liability was $50, unless a shipper declared a higher value. But the ability to declare a higher value was capped at $500. In this case, as Kemper points out, the tariff stipulated that "[s]hipments with a declared value in excess of $500.00 are not acceptable for

transportation under this tariff." *Universal Computer Systems*, 479 F. Supp., at 641. However, in the "airbill" (the contract between the shipper and the carrier, and presumably the document that gives the shipper the best notice of its ability to opt out of the lower limitation of liability) the two options were described, including the $500 cap on the higher declared value liability, but nowhere was the refusal to accept goods in excess of that value for shipment mentioned.

In *First Pennsylvania*, the same tariff as in *Universal Computer Systems* applied, and the carrier's airbill was the same as well. In both cases the tariff recited that goods of value in excess of the declared value cap of $500 may not be transported, and in both cases the airbill made no mention of the carrier's refusal to transport goods of excess value. Therefore the declared value cap served simply to limit liability to $500, the maximum amount a shipper was permitted to declare. In *First Pennsylvania*, the court found the carrier's limitation of liability was valid under the released value doctrine.

It is further worth mentioning that when, as in the present case, shippers are given the opportunity to purchase private insurance, and in fact do so rather than opting for more expensive coverage by the carrier, the liability limitation is viewed in an even more generous light. As Judge Leisure held, in a case strikingly similar to the present case, three factors are relevant to whether a carrier has effectively limited its liability: 1) adequate notice, 2) sophistication of parties, and 3) "the availability of 'spot' insurance to cover a shipper's exposure." *United States Gold Corp. v. Federal Express Corp.*, 719 F.Supp. 1217, 1225 (S.D.N.Y. 1989).

Appendix B

The Ninth Circuit has been even more forceful in articulating the relevance of private insurance to the released value doctrine:

> The function of the federal common law rule requiring notice of limited liability is to ensure that the shipper has an opportunity to make an informed choice between, on the one hand, shipping at a lower cost with limited liability, and, on the other, *separately purchasing insurance* or shipping at a higher cost without limited liability. . . . *The separate purchase of insurance simply cannot be reconciled with a contention that the shipper has been disadvantaged* by a lost opportunity to pay the carrier more money in return for greater coverage.

Read-Rite Corp., 186 F.3d, at 1198 (emphasis added).

Here, the shipper not only had the opportunity to insure privately, but chose to do so rather than pay the higher declared value fee. The fact that the shipper had adequate notice, opportunity to purchase a higher level of liability from FedEx (capped at $500), and the opportunity to purchase private insurance if the liability cap was insufficient for the shipper's purposes, suggest that in this case the goals of the released value doctrine have been met. I conclude that the limited liability provisions of the contract are enforceable and will grant FedEx's motion for partial summary judgment as to Count III.

3. The Limitation of Liability Provision is Not Voidable as Against Public Policy (Count IV)

Count IV of Kemper's complaint seeks to set aside the liability limitation in FedEx's contract of carriage because the shipments were stolen by FedEx employees. Enforcement of the contract under these circumstances, Kemper asserts, would be against public policy. Because Kemper's argument seeks to enlarge the contract terms through reliance on policies beyond the contract itself, the claim is preempted by the ADA. *Wolens*, 513 U.S. at 232. As the First Circuit has noted, "balancing advantages and disadvantages, both Congress and the courts have approved the use of such [limitation of liability] clauses." *Hill Construction*, 996 F.2d at 1317. Accordingly, I will grant FedEx's motion for dismissal of Count IV.

C. Claims Against Does (Unidentified Employees)

The claims must be dismissed without prejudice against the unidentified employees of FedEx who allegedly stole the jewelry in question. The Federal Rules of Procedure make no mention of mechanisms for pleading against unnamed parties through the use of the legal fiction of John Doe or Jane Roe. Of course, this fiction has been allowed in order to proceed against parties who are not known at the time the complaint is filed, but whose identities may be learned through the discovery process. *See, e.g., Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). "As Bivens . . . recognize[s], when, as here, a party is ignorant of defendants' true identity, it is unnecessary to name them until their identity can be learned through discovery or through

the aid of the trial court." *Maclin v. Paulson*, 627 F.2d 83, 87 (7th Cir. 1980). However, the Doe fiction may only be used until such time as the actual identities can be learned. "Fictitious parties must eventually be dismissed, if discovery yields no identities." *Scheetz v. Morning Call, Inc.*, 130 F.R.D. 34, 37 (E.D.Penn. 1990). *See also, e.g., Schiff v. Kennedy*, 691 F.2d 196, 198 (4th Cir. 1982); *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). Here, the plaintiff has not identified the unnamed parties nor is there any prospect it will do so in this litigation; therefore its claims against them are hereby dismissed without prejudice.

III. THE PROPOSED AMENDED COMPLAINT

Kemper has filed a motion to amend its complaint to include three additional issues.[3] Kemper argues that 1) FedEx's limitation of liability has been rescinded because FedEx materially breached the shipping contract when its employees allegedly stole the packages; 2) FedEx's limitation of liability is invalid because it acted willfully and intentionally to permit its employees to steal; and 3) because some shipments traveled by truck, the contract is controlled by the Carmack Amendment, 49 U.S.C. § 14706(c). I find that none of these charges have merit, and therefore deny the motion to amend as futile.

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3. Kemper has also offered some amendments to Counts I (Conversion as to Does) and III (Breach of Contract) from the original complaint as new Counts V and I. These proposed modifications do not materially change the original complaint sufficient to warrant discussion.

Appendix B

A. Recission of Limitation of Liability Due to Material Breach (Count II)

Kemper argues that FedEx's limitation of liability ought to be rescinded because the alleged conversion of goods by FedEx employees constituted a material breach of the shipping contract. Kemper cites *Hill Construction*, 996 F.2d at 1319, for the proposition that a limitation of liability shall be rescinded when "transportation related circumstances" arise which fall outside the expectations of the parties. In *Hill Construction*, the First Circuit reversed the District Court's finding that a limitation of liability was invalid. At best, *Hill Construction* can be read to support the proposition that a limitation of liability in a shipping contract may not be valid if "the carrier made a special separate promise to the shipper," *Id.* at 1319, which it then breached. In this case, as in *Hill Construction*, no "special separate promise" was made. Rather, FedEx attempted to limit its liability for a wide range of eventualities; the shippers accepted the limitation of liability and insured their shipments with Kemper to protect themselves against loss. Even conversion by employees of FedEx falls within this umbrella limitation of liability, and therefore the "material deviation doctrine" is inapplicable here.

B. Willful and Wanton Misconduct (Count III)

Plaintiff has alleged in its Motion to Amend that because FedEx behaved in a willfully and wantonly negligent fashion, its waiver of liability is not valid under federal law against a claim of conversion. Indeed, a carrier, air or other, that has converted goods to its own use, cannot enforce a limitation

of liability. *See, e.g., Deiro*, 816 F.2d at 1366. There is even some support for the proposition that a carrier that has behaved willfully and intentionally may be unable to assert its limitation of liability. *See T.B.I. Industrial Corp. v. Emery Worldwide*, 900 F.Supp. 687, 693-94, (S.D.N.Y. 1995) citing *U.S. Gold Corp. v. Federal Express Corp.*, 719 F.Supp. 1217, 1225-26 (S.D.N.Y. 1989).[4] I take the court's discussion of willful and intentional misconduct in *U.S. Gold* to be a gloss on the exception to the released value doctrine for carriers that have converted property to their own use. However, dicta in these two cases from the Southern District of New York does not overcome direct holdings constituting persuasive precedent from other circuits. In *Neal*, Judge Shadur held that "[w]here interstate carriage is concerned, only an appropriation of property by the carrier for its own use is sufficient to get around limits on liability. Wilful misconduct is not enough." *Neal*, 605 F.Supp. at 1149, n.3. In *Glickfeld*

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4. The other cases cited by the plaintiff, *Thompson v. National Railroad Passenger Corp.*, 621 F.2d 814 (6th Cir. 1980), *Uhlik v. Penn. Central Railroad Co.*, 459 F.2d 460 (6th Cir. 1972), *Mitchell v. Union Pacific Railroad Co.*, 242 F.2d 598 (9th Cir. 1957), *G.C. Martin v. Greyhound Corp.*, 227 F.2d 501 (6th Cir. 1955), are inapplicable here, not because they relate to railroad or bus services, as suggested by the defendant, but because they are not on point. In *Mitchell* and *Uhlik*, the plaintiffs allege willful and wanton misconduct, but the courts did not reach the merits of their claims, because they based their rulings on other grounds. *Thompson* and *C.G. Martin* involved the ability of common carriers to limit their liability for personal injuries to paying passengers. Under federal common law, common carriers could not limit their liability for the personal injury of their paying passengers. The instant case, however, involves the released value doctrine, an exception to the rule that common carriers cannot limit their liability, and thus these cases are not applicable.

v. Howard Van Lines, Inc., the Ninth Circuit held that "the cases are uniform in holding that the conversion doctrine is only pertinent when there has been a true conversion, i.e., where the carrier has appropriated the property for its own use or gain. The carrier may properly limit its liability where the conversion is by third parties or even by its own employees." *Glickfeld*, 213 F.2d 723, 727 (9th Cir. 1954). Even if there could be some level of willful and intentional conduct by a carrier that would be so egregious as to rise to the level of conversion for its own use, I take the bar to be very high. Kemper has not set forth facts sufficient to support such a claim and meet this burden.

C. Carmack Amendment (Count IV)

Plaintiff argues that if the deliveries were actually made by truck, rather than air, the agreement would be governed by the Interstate Commerce Act, specifically the Carmack Amendment, 49 U.S.C. § 14706 (1997), rather than the APA. However, because the requirements for limiting liability under the Carmack Amendment are materially the same as under the APA, I hold that the motion to amend to raise this issue is futile.

Under the Carmack Amendment "a carrier is fully liable for the actual loss or injury to the property, unless it takes specific actions to limit its liability." *Camar Corp. v. Preston Trucking Co., Inc.*, 221 F.3d 271, 2000 WL 1134524, *4 (1st Cir. 2000). Thus a carrier governed by the Carmack Amendment may not limit its liability at will. Rather, "only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly

carrier lawfully limit recovery to an amount less than the actual loss sustained . . . ." *Hollingsworth & Vose Co. v. A-P-A Transportation Corp.*, 158 F.3d 617, 619-20 (1st Cir. 1998) quoting *New York, New Haven & Hartford R.R. v. Nothnagle*, 346 U.S. 128, 135-36 (1952).[5] The court in *Hollingsworth* went on to state that "[t]his 'fair opportunity' language . . . has taken on a life of its own, and later circuits have treated the rubric almost as if it were an independent requirement of the Carmack Amendment." *Id.*, at 620.

This "independent requirement" of the Carmack Amendment has, however, the same contours as the "released value" doctrine under federal common law, *see* discussion *supra* section II(B)(1), which has been held to apply not only to motor carriers (which are bound by the I.C.A.), but to all common carriers including airlines. Therefore, for present purposes, it does not matter whether the Carmack Amendment or the APA applies. In either circumstance, federal law applies, and the released value doctrine, or its functional equivalent, controls. The Plaintiff's claim that if the Carmack Amendment applies, the Defendant's limitation of liability is "void ab initio," is simply incorrect.

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5. In *Camar Corp.*, 99-1007, at 10-11, the First Circuit reaffirmed its commitment to the holding of *Hollingsworth*, 158 F.3d, that the existence of a proper bill of lading is sufficient notice of a limitation of liability. In *Camar*, as distinguished from *Hollingsworth*, no formal bill of lading was issued, and thus no sufficient notice was given of the limitation of liability. In the instant case, airbills were issued in which the shippers opted not to declare a value for the goods shipped.

While motions to amend are treated liberally in this Circuit, a court may deny them if, as a matter of law, amendment would be futile. *See Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790, 792 (1st Cir. 1995). In this case, Kemper's motion to amend the complaint to allege violations of the Carmack Amendment is futile as a matter of law, because the standard applied to a motor carrier under the Carmack Amendment is for present purposes materially the same as the standard applied to air carriers under federal common law. Therefore, I do not reach the issue of whether FedEx should be treated as an air carrier or motor carrier for the purposes of the Carmack Amendment when it transports goods entirely by truck.

IV. CONCLUSION

For the reasons set forth more fully above, I hereby ALLOW Defendant FedEx's motion to dismiss and for partial summary judgment and DENY Plaintiff Kemper's motion to amend. I DISMISS the claims against the Defendant Does without prejudice.

The clerk, upon certification from FedEx that it has tendered the limitation amount to Kemper, is directed to enter final judgment for Kemper in the amount of $800 on Count III of the original complaint.

DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

APPENDIX C — RELEVANT STATUTE

49 U.S.C. § 14706

§ 14706. Liability of carriers under receipts and bills of lading

(a) General liability. —

(1) Motor carriers and freight forwarders. — A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and, except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff under section 13702. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) Freight forwarder. — A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service and uses a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 to receive property from a consignor, the motor carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) Apportionment. — The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c) Special rules. —

(1) Motor carriers. —

(A) Shipper waiver. — Subject to the provisions of subparagraph (B), a carrier providing transportation or service subject

to jurisdiction under subchapter I or III of chapter 135 may, subject to the provisions of this chapter (including with respect to a motor carrier, the requirements of section 13710(a)), establish rates for the transportation of property (other than household goods described in section 13102(10)(A)) under which the liability of the carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

(B) Carrier notification. — If the motor carrier is not required to file its tariff with the Board, it shall provide under section 13710(a)(1) to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules, or practices.

(C) Prohibition against collective establishment. — No discussion, consideration, or approval as to rules to limit liability under this subsection may be undertaken by

carriers acting under an agreement approved pursuant to section 13703.

(2) Water carriers. — If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(d) Civil actions. —

(1) Against delivering carrier. — A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State through which the defendant carrier operates.

(2) Against carrier responsible for loss. — A civil action under this section may be brought against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(3) Jurisdiction of courts. — A civil action under this section may be brought in a United States district court or in a State court.

(4) Judicial district defined. — In this section, "judicial district" means —

(A) in the case of a United States district court, a judicial district of the United States; and

(B) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) Minimum period for filing claims. —

(1) In general. — A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice.

(2) Special rules. — For the purposes of this subsection —

(A) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(B) communications received from a carrier's insurer shall not constitute a

disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reason for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

(f) Limiting liability of household goods carriers to declared value. — A carrier or group of carriers subject to jurisdiction under subchapter I or III of chapter 135 may petition the Board to modify, eliminate, or establish rates for the transportation of household goods under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper or by a written agreement.

(g) Modifications and reforms. —

(1) Study. — The Secretary shall conduct a study to determine whether any modifications or reforms should be made to the loss and damage provisions of this section, including those related to limitation of liability by carriers.

(2) Factors to consider. — In conducting the study, the Secretary, at a minimum, shall consider —

(A) the efficient delivery of transportation services;

(B) international and intermodal harmony;

(C) the public interest; and

(D) the interest of carriers and shippers.

(3) Report. — Not later than 12 months after January 1, 1996, the Secretary shall submit to Congress a report on the results of the study, together with any recommendations of the Secretary (including legislative recommendations) for implementing modifications or reforms identified by the Secretary as being appropriate.

* * * *

APPENDIX D — CONTRACT PROVISIONS OF FEDERAL EXPRESS CORPORATION

Terms And Conditions

Definitions On this Airbill, "we," "our" and "us" refer to Federal Express Corporation, its employees, and agents. "You" and "your" refer to the sender, its employees, and agents.

Agreement To Terms By giving us your package to deliver, you agree to all the terms in our current Service Guide, which is available on request. You also agree to those terms on behalf of any third party with an interest in the package. If there is a conflict between the Service Guide and this Airbill, the Service Guide will control. No one is authorized to change the terms of our Agreement.

Responsibility For Packaging And Completing Airbill You are responsible for adequately packaging your goods and properly filling out this Airbill. If you omit the number of packages and/or weight per package, our billing will be based on our best estimate of the number of packages we received and/or an estimated "default" weight per package as determined by us.

Responsibility For Payment Even if you give us different payment instructions, you will always be primarily responsible for all delivery costs, as well as any cost we incur in either returning your package to you or warehousing it pending disposition.

Appendix D

Limitations On Our Liability And Liabilities Not Assumed

- Our liability for loss or damages to your package is limited to your actual damage or $100, unless you declare a higher value, pay an additional charge, and document your actual loss in a timely manner. You may pay an additional charge for each additional $100 of declared value. The declared value does not constitute, nor do we provide cargo liability insurance.

- In any event, we will not be liable for any damage, whether direct, incidental, special, or consequential in excess of the declared value of a shipment, whether or not Federal Express had knowledge that such damages might be incurred including but not limited to loss of income or profits.

- We won't be liable:

  – for your acts or omissions including but not limited to improper or insufficient packing, securing, marking, or addressing or those of the recipient or anyone else with an interest in the package

  – if you or the recipient violate any of the terms of our Agreement

  – for loss or damage to shipments of prohibited items

  – for loss, damage, or delay caused by events we cannot control, including but not limited to acts of God, perils of the air, weather conditions, acts of public enemies,

war, strikes, civil commotions, or acts of public authorities with actual or apparent authority.

Declared Value Limits

- The highest declared value allowed for FedEx Letter and FedEx Pak shipments is $500.

- For other shipments, the highest declared value allowed is $50,000 unless your package contains items of "extraordinary value," in which case the highest declared value allowed is $500.

- Items of "extraordinary value" include shipments containing such items as artwork, jewelry, furs, precious metals, negotiable instruments, and other items listed in our Service Guide.

- You may send more than one package on this Airbill and fill in the total declared value for all packages, not to exceed the $100, $500 or $50,000 per package limit described above. (Example: 5 packages can have a total declared value of up to $250,000.) In that case, our liability is limited to the actual value of the package(s) lost or damaged, but may not exceed the maximum allowable declared value(s) or the total declared value, whichever is less. You are responsible for proving the actual loss or damage.

Filing A Claim YOU MUST MAKE ALL CLAIMS IN WRITING and notify us of your claim within strict time limits set out in the current Service Guide.

Appendix D

We'll consider your claim filed if you notify our Customer Service Department at 1•800•Go•FedEx (800) 463-3339 and make your claim in writing as soon as possible.

Within 90 days after you notify us of your claim, you must send us all the information you have about it. We aren't obligated to act on any claim until you have paid all transportation charges, and you may not deduct the amount of your claim from those charges.

If the recipient accepts your package without noting any damage on the delivery record, we will assume the package was delivered in good condition. For us to process your claim, you must make the original shipping cartons and packing available for inspection.

Right To Inspect We may, at our option, open and inspect your packages before or after you give them to us to deliver.

Right Of Rejection We reserve the right to reject a shipment when such shipment would be likely to cause delay or damage to other shipments, equipment, or personnel or if its shipment is prohibited by law, or if the shipment would violate any terms of our Agreement or our current Service Guide.

C.O.D. Services C.O.D. SERVICE IS NOT AVAILABLE WITH THIS AIRBILL. If C.O.D. Service is required, please use a Federal Express C.O.D. airbill.

Air Transportation Tax Included A federal excise tax when required by the Internal Revenue Code on the air transportation portion of this service, if any, is paid by us.

Appendix D

Money-Back Guarantee In the event of untimely delivery, Federal Express will at your request and with some limitations, refund or credit all transportation charges. See current Service Guide for more information.

Freight Services There are several freight service options, depending on your transit time needs.

- **FedEx Overnight Freight:** Next business-day service to all points in the 48 states; rates are based upon the distance shipped.

- **FedEx 2Day Freight:** Second business-day service to all points in the 48 states; rates are based upon the distance shipped.

- **FedEx Express Saver Freight:** Up to 3 business-day service to all points in the 48 states; rates are based upon the distance shipped.

FILED
OCT 12 2001
OFFICE OF THE CLERK

No. 01-426

IN THE

Supreme Court of the United States

KEMPER INSURANCE COMPANIES,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Federal Express Corporation, is a wholly owned subsidiary of FedEx Corporation. The stock of FedEx Corporation is publicly traded on the New York Stock Exchange.

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STATEMENT OF THE CASE

FedEx's standard contract of carriage limits its liability for loss, damage or delay of a shipment to $100 unless the shipper declares a higher value and pays a correspondingly higher transportation charge. A shipper may generally declare a value up to $50,000 per package for most commodities, but may only declare a value up to $500 for shipments of jewelry and other "items of extraordinary value" as defined in the contract.

The shipper in this case shipped eight packages of jewelry and chose not to declare a value for any of the shipments, which were lost while in FedEx's possession. Instead, the shipper accepted the $100 limit of liability and chose to transfer the risk of loss to its insurance company, Kemper, the petitioner. Kemper does not dispute the content of FedEx's contract of carriage, nor does it allege any ambiguity in the language of that contract. Rather, the petitioner asks this Court to review this case for the purpose of setting aside the contractual limit of liability by rewriting FedEx's contract for the petitioner's benefit.

The petitioner alleges that FedEx's limitation of liability is not enforceable because the $500 limit on declared value for shipments of jewelry is too low. This contention was properly rejected by the Court of Appeals which held that FedEx's limit of liability is enforceable under the released value doctrine articulated by this Court and by other federal courts.

Because the decision of the Court of Appeals was consistent with the prior rulings of this Court and numerous other federal courts, the Court should deny the writ.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Ruling Comports With Prior Rulings of This Court.

The petitioner urges this Court to review the ruling of the Court of Appeals because that decision is inconsistent with the decisions of this Court regarding the declared value doctrine. According to the petitioner, FedEx's contract of carriage is unenforceable because the $500 limit on declared value for shipments of jewelry is too low. The petitioner then attempts to wedge this novel theory into language taken out of context from previous decisions of this Court and create a rule that FedEx can only validly limit its liability by refusing to accept goods worth more than the declared value. No such rule exists from the decisions of this, or an other, Court. In fact, the petitioner has not cited a single case from any jurisdiction where the carrier's limit of liability was held unenforceable because the upper limit of declared value was too low.

A. Courts Have Long Enforced Contractual Limitations of Liability As a Matter of Law.

For more than a century, courts have enforced limitations of carriers' liability because such limitations reflect the realities of commercial transport. The carrier, in return for offering reasonable shipping rates, is allowed to limit its liability for any damages arising out of the shipment. As this Court has explained:

> There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight

> on the assertion and agreement that its value is a lesser sum than that claimed after loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume.

Hart v. Pennsylvania R. Co., 112 U.S. 331, 340 (1884).

This doctrine, commonly referred to as the released value or declared value doctrine, was subsequently incorporated into federal statutes regulating common carriers (*i.e.*, the Interstate Commerce Act (1887), the Hepburn Act (1906), the Civil Aeronautics Act (1938) and the Federal Aviation Act (1958)). The doctrine expressly governed the liability of carriers for air cargo shipments covered by the Federal Aviation Act of 1958 until the Act's repeal. While the Airline Deregulation Act of 1978 terminated the regulatory powers of the Civil Aeronautics Board, including the authority to approve rates and regulate damage claim procedures, (*see, e.g.*, *National Small Shipments Traffic Conference v. Civil Aeronautics Board*, 618 F.2d 819 (D.C. Cir. 1980)), it is well settled throughout the federal circuits that the declared value principle survived deregulation as part of the federal common law of air carrier liability. *See, e.g.*, *Nippon Fire & Marine Insurance Co., Ltd. v. Skyway Freight Systems, Inc.*, 235 F.3d 53, 59 (2d Cir. 2000); *Read- Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1195 (9th Cir. 1999); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997); *First Pennsylvania Bank N.A. v. Eastern Airlines*, 731 F.2d 1113 (3d Cir. 1984).

B. The Court of Appeals Correctly Held That FedEx's Contract of Carriage Complies With The Released Value Doctrine.

The petitioner asserts that FedEx's limitation of liability does not comply with the released value doctrine and that the Court of Appeals erred in upholding the limit of liability. In fact, the Court of Appeals correctly stated the test for enforcement of a carrier's limit of liability and correctly held that FedEx's limit of liability is enforceable under established federal common law. If a carrier wishes to limit its liability, its contract must offer the shipper: (1) reasonable notice of the limit of liability; and (2) a fair opportunity to purchase higher liability. *See New York, New Haven & Hartford Railroad, Co. v. Nothnagle*, 346 U.S. 128, 135 (1953).

FedEx has clearly met the test in *Nothnagle* for an enforceable limit of liability in its shipping contract. The applicable Federal Express Service Guide, incorporated into the contract of carriage by reference, advised the shipper of FedEx's limit of liability:

> ***Declared Value and Limits of Liability***
>
> A. The declared value of any shipment represents our maximum liability in connection with a shipment, including, but not limited to any loss, damage, delay, misdelivery, nondelivery, misinformation or any failure to provide information.
>
> Exposure to and risk of any loss in excess of the declared value is either assumed by the shipper or transferred by the shipper to an insurance carrier through the purchase of an insurance policy. You

should contact an insurance agent or broker if insurance coverage is desired. WE DO NOT PROVIDE INSURANCE OF ANY KIND.

B. Our liability with regard to any package is limited to the sum of $100 unless a higher value is declared on the airbill for the package at time of tender, and a greater charge paid as provided in paragraph (C) below. . . .

* * *

D. . . . If no value is declared, the declared value and our liability will be limited to the actual value or $100, whichever is less.

* * *

Liabilities Not Assumed

WE WILL NOT BE LIABLE FOR ANY DAMAGES, WHETHER DIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL, IN EXCESS OF THE DECLARED VALUE OF A SHIPMENT, WHETHER OR NOT WE KNEW OR SHOULD HAVE KNOWN THAT SUCH DAMAGES MIGHT BE INCURRED, INCLUDING, BUT NOT LIMITED TO LOSS OF INCOME OR PROFITS.

(Emphasis in original).

Kemper concedes that the shipper had sufficient notice that the $100 limit of liability would apply unless the shipper chose to declare and pay for a higher value. Kemper does

not dispute that the shipper was given the opportunity to declare a higher value — up to $500 for shipments of jewelry[1].

The plaintiff alleges, however, that FedEx's limit of liability is not enforceable because FedEx limits the declared value on shipments of jewelry to $500. The Court of Appeals considered Kemper's argument and properly rejected it because Kemper misconstrues the released value doctrine to require the carrier to accept unlimited liability or to limit the value of commodities it accepts. Under this theory even FedEx's standard $50,000 limit on declared value would be insufficient. The plaintiff has not cited, and counsel for FedEx is not aware of, a single case where an air carrier's limit of liability has been set aside because the upper limit for declared value was too low.

The petitioner alleges that *Union Pacific R. Co. v. Burke*, 255 U.S. 317 (1921) and *New York, New Haven & Hartford Railroad, Co. v. Nothnagle*, 346 U.S. 128, 135 (1953) provide a basis for holding FedEx's limit of liability unenforceable. To the contrary, these cases set forth the proper rule for enforcement of a valid limit of liability, but the liability limitation was not enforceable under the facts of the particular case. In *Burke*, the carrier's limit of liability was unenforceable because the railroad did not provide any

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1. Some courts have held that the shipper's decision to buy private insurance evidences a conscious decision to accept the carrier's liability limitation. *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1198, *citing*, *Vision Air Flight Service v. M/V National Pride*, 155 F.3d 1165, 1169 (9th Cir. 1998); *Travelers Indemnity Co. v. The Vessel Sam Houston*, 26 F.3d 895, 900 (9th Cir. 1994); *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897, 901 n.10 (9th Cir. 1989).

opportunity to declare a value higher than the $100 default liability. *Burke*, 255 U.S. at 323. By contrast, FedEx's contract of carriage complies with the declared value doctrine because it gives the shipper the opportunity to declare a value up to $500 for shipments of jewelry. In *Nothnagle*, the carrier's limit of liability was held unenforceable because the shipper had no notice of the limitation. 346 U.S. at 136. The shipper simply handed her baggage to a porter and did not receive any documentation in return. 346 U.S. at 129. In this case, the petitioner concedes that the shipper had notice of the limit of liability. The Court of Appeals' decision in this case is entirely consistent with the declared value doctrine articulated in *Burke* and *Nothnagle*.

Likewise, the Court of Appeals' decision is consistent with other federal courts which routinely uphold FedEx's contractual limitation of liability and limit a claimant's damages to $100 for lost, damaged or delayed shipments. *Wagman v. Federal Express Corp.*, 844 F. Supp. 247 (D. Md. 1994), *aff'd*, 47 F.3d 1166 (4th Cir. 1995) (lawsuit delivered late, $100 limit of liability enforced); *Hampton v. Federal Express Corp.*, 917 F.2d 1119 (8th Cir. 1990) (blood samples contaminated, limit of liability enforced); *Zubaz, inc. v. Federal Express Corp.*, 864 F. Supp. 723 (W.D. Tenn. 1994); *U.S. Gold Corp. v. Federal Express Corp.*, 719 F. Supp. 1217 (S.D.N.Y. 1989) (gold grain); *Uniden Corp. v. Federal Express Corp.*, 642 F. Supp. 263 (M.D. Penn. 1986) (performance bond for bid; $100 limit of liability enforced).

The Court of Appeals correctly held that any damages which the plaintiff might recover are limited to $100 per shipment under the contracts of carriage which notified the shipper that FedEx's liability was limited to $100 unless a higher value was declared. That same contract also notified the shipper that FedEx

does not provide insurance of any kind and that the shipper should transfer the risk of loss to an insurer if enhanced protection was warranted. The shipper accepted FedEx's limited liability (and its corresponding lower transportation charge) and transferred the risk of loss to its insurance carrier, Kemper. The petitioner should not be allowed to set aside this valid contractual limitation agreed to by FedEx and the shipper.

II. Public Policy Considerations Support Enforcement of FedEx's Limit of Liability.

The petitioner alleges that the Court of Appeals ruling changes the jurisprudence governing the carriage of cargo, and that the shipping public will be harmed by the consequences of the decision. As established above, the decision below does not effect any change in the released value doctrine. The policy considerations raised by the plaintiff, moreover, have been incorporated into the evolution of the released value doctrine. As this Court eloquently stated over a century ago:

> It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper would be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in the case of loss.

Hart v. Pennsylvania R. Co., 112 U.S. 331, 341 (1884). The petitioner's attempt to set aside the limit of liability in this case is repugnant to the public policy evidenced in the declared value doctrine.

The petitioner's policy argument also conflicts with Congress' expressed intention of allowing market forces to govern the rates of air carriers. The petitioner implies that shippers have no choice but to accept FedEx's contract. In fact, shippers have many choices of carriers to transport their shipments, and are free to use them if FedEx's contract terms are too burdensome. If enough shippers abandon FedEx's services because of its proffered contract terms, FedEx will undoubtedly change its contract to attract new customers. Such market mechanisms — not judicial intervention — are the proper method of "regulating" an air carrier's rates. As this Court has recognized, Congress expressed its intent to allow market forces to govern the rates of air carriers through the Airline Deregulation Act, 49 U.S.C. § 41713. *American Airlines v. Wolens*, 513 U.S. 219 (1995) *citing*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *see also* 49 U.S.C. § 40101 where Congress mandated "maximum reliance on competitive market forces" in the regulation of airlines. Consistent with this reliance on market forces, this Court has held that the ADA confines courts in breach of contract actions to enforcing the parties' bargain with no enlargement based on state laws or policies external to the agreement. *Wolens*, 513 U.S. at 223. The petitioner urges this Court to accept this case for the purpose of redrafting the plain language of the contract of carriage and setting aside FedEx's limit of liability. The Court should deny the petition, and thereby confine the petitioner to the terms of the contract as written.

CONCLUSION

The decision of the Court of Appeals is consistent with federal law enforcing the limitations of liability in air carriers' contracts, and is consistent with Congress' intent to allow market forces to regulate the rates of air carriers. The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 01-426

IN THE

Supreme Court of the United States

KEMPER INSURANCE COMPANIES,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's Rule 29.6 Statement was set forth at page ii of Petitioner's Opening Brief, and there are no amendments to that Statement.

ARGUMENT

I. This Court's Decision In *Wolens* Does Not Allow Air Carriers To Ignore Public Policy Considerations Mandated By Federal Common Law Which Forbid Common Carriers To Exempt Themselves From Liability For Their Negligent Acts.

Respondent contends that public policy considerations under federal common law which forbid common carriers from exempting themselves from liability for their negligent acts are preempted under the Airline Deregulation Act ("ADA"), § 41713(b)(1), pursuant to this Court's decisions in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 219 (1992), and that now market forces are the only governing standard. As a preliminary matter, the ADA, and thus the holdings in *Wolens* and *Morales* do not apply to motor carriers or shipments transported exclusively by truck — as four of eight shipments at issue were here. But more importantly, both *Wolens* and *Morales* addressed whether and when *state* law is preempted by § 41713(b)(1). The issue in *Wolens* was whether a state deceptive trade practices act was preempted by § 41713(b)(1), and the issue in *Morales* was whether state guidelines governing airline fare advertising were preempted. There is nothing in either decision to suggest that established federal common law concerning common carriers' limitation of liability is somehow preempted by § 41713(b)(1). Section 41713(b)(1) reads as follows:

> Preemption - Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least two States may not enact or enforce a law, regulation, or other

> provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

Respondent concedes that federal common law, namely the released value doctrine, applies to determine the enforceability of its limitation of liability for valuables. Yet at the same time, respondent argues that the public policy considerations which the released value doctrine were founded on, namely that carriers cannot exempt themselves from liability for their negligent acts, is now excess baggage which need not be considered by this Court. Respondent cannot have it both ways. Respondent cannot separate the requirement that carriers cannot exempt themselves from liability for their negligence from the released value doctrine as a whole. As this Court and lower federal courts have held numerous times, a carrier's limitation is unenforceable if it exempts the carrier from liability for its negligence. Please see *New York, N.H. & Hartford R. Co. v Nothnagle*, 346 U.S. 128, 136 (1953); *Union Pacific R. Co. v Burke*, 255 U.S. 317, 321-22 (1921); *Boston & M.R.R. v. Piper*, 246 U.S. 439, 444 (1918); *George N. Pierce Company v. Wells Fargo & Company*, 236 U.S. 278, 283 (1915); *Boston & Maine Railroad v. Katherine Hooker*, 233 U.S. 97, 120-21 (1914); *Missouri Kansas & Texas Railway Company v. Harriman Brothers*, 227 U.S. 657, 672 (1913); *Kansas City Southern Railway Company v. J.M. Carl*, 227 U.S. 639, 649-50 (1913); *Adams Express Company v. E.H. Croninger*, 226 U.S. 491, 509 (1913); *Hart v. Pennsylvania R. Co.*, 112 U.S. 331, 338 (1884). Nothing in the ADA, *Wolens* or *Morales* suggests that either air or motor carriers can now disregard this Court's prior rulings by exempting themselves from liability for their negligence.

49 U.S.C. § 14706, "the Carmack Amendment" recognizes and codifies the carrier's right to limit its liability by contract. However, Congress has specifically retained the requirement that to be enforceable, any such limitation must be "reasonable in the circumstances surrounding the transportation". Thus, carriers' limitations of liability are not merely and exclusively contractual, but are still subject to objective external standards and review. Though the Carmack Amendment itself is only applicable to motor carriers, the common law which it codifies is equally applicable to air carriers. *Klicker v. Northwest Airlines, Inc.*, 563 F.2d 1310, 1314 (9th Cir. 1977)

Respondent quotes *Hart* as establishing that a carrier may legally limit its liability by contract. Petitioner does not dispute that a carrier can limit its liability, *as long as it does not exempt itself from liability by offering no terms by which it can be held liable over a certain amount. Hart* expressly found:

> It is the law of this court that a common carrier may, by special contract, limit his common law liability; *but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants.*

Id. at 338.

Respondent limits the value shippers of valuables can declare to $500 but accepts valuables of any value. Respondent not only accepts valuables of any value but solicits shippers of high value items. If the shipper declares a value greater than $500 on the air waybill, respondent accepts the shipment and even charges a higher freight charge,

but if the valuable is lost or damaged, the respondent will pay only $500 regardless of the freight charge paid by the shipper. There is no relation between the freight charge and the liability assumed by respondent. Respondent's limitation is unenforceable because it exempts respondent from liability over $500 just as in *Burke*, where the carrier's limitation was held unenforceable because the carrier exempted itself from liability over $100 by limiting the value a shipper could declare to $100 per package. *Burke* at 321-22.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in petitioner's opening brief, this writ should be granted.

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